PRIVY COUNCIL.

P.C.
1908
June 16, 17,
23, *July* 27.

KALKA PRASAD AND OTHERS (PLAINTIFFS) *v.* MATHURA PRASAD AND ANOTHER (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow].

Evidence—Pedigrees—Proof of pedigree—Knowledge of names of ancestors from hearing them recited on ceremonial occasions—Pedigree made post litem motam—Controversy in different matter from that which if after suit would render statement inadmissible—Document made on particular occasion for specific purpose treated as declaration—Proof of heirship—Act No. I of 1872 *(Indian Evidence Act), section* 32, *clause* (5).

The plaintiffs sued to recover immovable property as next heirs, through their father, of one Gur Sahai. The principal defendant was the sister's son of Gur Sahai. On the plaintiffs' oral evidence and on certain pedigrees produced by them the Subordinate Judge was of opinion that Gur Sahai and the plaintiffs' father were descended from one common ancestor, from whom they were only seven degrees removed, and that their claim was proved. The defendant produced a pedigree which showed that Gur Sahai was descended from another ancestor than that stated in the plaintiffs' pedigrees and was in the 15th degree from a common ancestor, and the plaintiffs' father in the 16th degree, and he contended that under Hindu law heirship did no extend beyond the 14th degree, and that therefore he, though only a sister's son was to be preferred to such remote relations as heir. The judgment of the Court of the Judicial Commissioner on appeal, after a lengthy and adverse criticism of the plaintiffs' evidence concluded as follows:—"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant" (defendant) "the plaintiffs are heirs of Gur Sahai, as according to it they are Samanodakas and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

Held that the above paragraph did not, under the circumstances and for the reasons stated by their Lordships of the Judicial Committee preclude the plaintiffs from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge in their favour.

Held also that the pedigrees put in by the plaintiffs were not ancient family records handed down from generation to generation and added to as a member of the family died or was born; but documents drawn up on particular occasions for a specific purpose by members of the family, and were accordingly to be treated as mere declarations made by the persons who respectively drew them up or adopted them.

One of the pedigrees dated in 1892 was held by the Court of the Judicial Commissioner to be inadmissible in evidence as having been made *post litem*

Present:—Lord ROBERTSON, Lord ATKINSON, Lord COLLINS, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

motam, although the controversy which originated in 1891 did not relate to the heirship to Gur Sahai but referred to an entirely different matter.

Held it was wrongly rejected as evidence. To make a statement inadmissible on the ground that it was made *post litem motam* the same thing must be in controversy before and after the statement is made.

Freeman v. *Phillips* (1), *In re Shrewsbury Peerage* (2) and *Duke of Devonshire* v. *Neill* (3) followed.

The pedigree was admissible as a declaration made by a deceased member of a family touching the family reputation on the subject of its descent.

A pedigree, also rejected by the Judicial Commissioner's Court as inadmissible, was one signed by a deceased member of the plaintiffs' family, in the handwriting of such deceased member's son, and was stated to have been obtained from his father as a statement of the family descent for the purpose of being given in evidence in certain criminal proceedings.

Held that it had been adopted by such deceased member of the family, and not being shown to be *post litem motam* it was admissible in evidence.

APPEAL from judgments and decrees (18th September 1905 and 17th April 1906) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (16th December 1903) of the Subordinate Judge of Unao, who had decreed the appellants' suit.

The principal question on this appeal was whether the appellants were the next heirs to one Gur Sahai who was the owner (amongst other properties) of the village of Somb, the village of Shakpur, and a 5 biswa share in the village of Rampur Asnu.

The facts of the litigation are sufficiently stated in their Lordships' judgment.

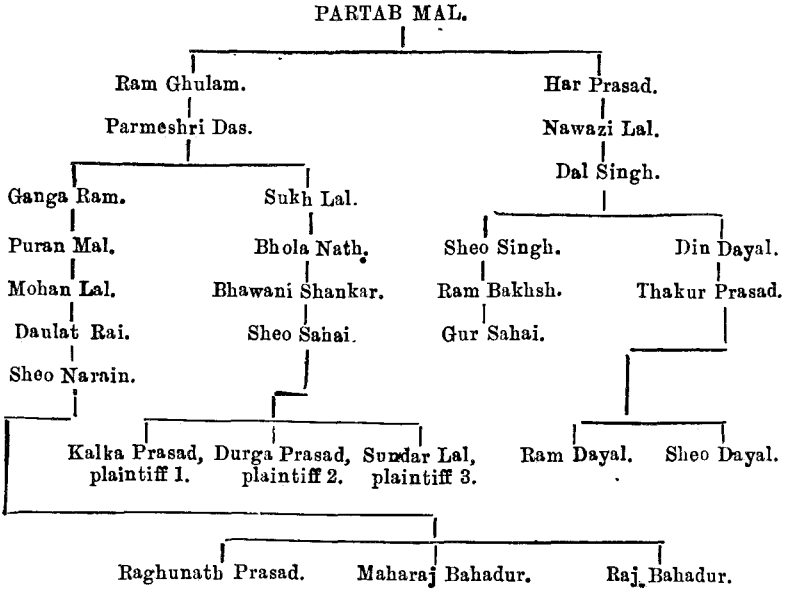
The appellants (Kalka Prasad, Durga Prasad, and Sundar Lal) were the sons of one Sheo Sahai, who, on the death in 1896 of Parbati Kunwar the widow of Gur Sahai, the last male owner

(1) (1816) 4 M. & S., 486 (494, 497). (2) (1857) 7 H. L. C. 1 (22.
(3) (1877) 2 Ir. L. R., 132.

1908

KALKA PRASAD v. MATHURA PRASAD.

put forward a claim to succeed to his estate as the next reversionary heirs on the basis of the following pedigree :—



The Revenue Courts, however, made an order on 23rd April 1897 for mutation of names in favour of Mathura Prasad the first respondent who claimed title as sister's son of Gur Sahai.

The suit out of which this appeal arose was brought on 20th May 1901 by the appellants against Mathura Prasad and Chaudhri Nazrat Ali a transferee of part of the estate to recover the property belonging to Gur Sahai.

The Subordinate Judge on a consideration of the evidence oral and documentary found that the pedigree produced by the plaintiffs was proved and made a decree in their favour. He concluded his judgment as follows :—

"It is made clear that in the line of Partab Mal, Sheo Sahai and Gur Sahai were removed from him by 7 degrees ; and that at the death of Musammat Parbati, there was no heir living who was nearer than Sheo Sahai. The plaintiffs claim in the capacity of *Sapindas*, and the same has also been proved. A question was also raised to the effect, as to how many degrees are given to *Samandokas*. The learned counsel for plaintiffs contends that even after 14 degrees, the surviving members of family will be treated as *Samandokas*. It is not necessary now to go into this question. The principle involved in this question is that up to the 7th degree, the heirs are treated as *Sapindas*, and up to 14th, as *Samandokas*. . . . . Again, I have also shown above that not only on the present occasion

it has been proved that Sheo Sahai belongs to the line of Partab Mal and figures in the 7th degree, but on previous occasions also, whenever any pedigree was filed, he was shown in the same line and in same degree, particularly in the pedigrees of 1889 and 1892, which were filed before the litigation about the proprietary right arose. Thus finally I hold that the pedigree is correct, and that Sheo Sahai is the near heir to Gur Sahai. . . . . A strange feature of this case is that, leaving Sheo Sahai aside, the other persons who filed pedigrees, as mentioned above, also entered Sheo Sahai's name in the line of Partab Mal at No. 7. Hence it is that the pedigrees filed by other suitors subsequently to the arising of litigation about proprietary right, bear out the statement of plaintiffs (which has also been proved by other evidence) and should be treated as very strong corroborative evidence. The defendants totally failed to rebut this evidence. Plaintiff himself came into the witness-box, and first of all stated the pedigree. He made a mistake in giving the parentage of one person, but immediately corrected the mistake on further consideration. So in my opinion this fact does not detract anything from his evidence."

On appeal by the defendants, the Court of the Judicial Commissioner (R. SCOTT and A. E. RYVES) on 18th September 1905 were of opinion that the pedigree put forward by the plaintiffs was not proved, but that on a pedigree produced by the defendant Mathura Prasad the plaintiffs were entitled to succeed to a $\frac{1}{6}$th share of the estate, the remaining $\frac{4}{6}$th vesting in Gur Prasad, Sita Ram, Ram Sahai and Manohar Lal. They therefore varied the decree of the Subordinate Judge and gave the plaintiffs a $\frac{1}{6}$th share in the estate of Gur Sahai with mesne profits and costs in proportion.

After shortly stating the facts and setting out the pedigree as above, the appellate Court said :—

"The defence of the defendants" (Mathura Prasad and Chaudhri Nasrat Ali) "was the same. They denied the pedigree filed by the plaintiffs and Mathura Prasad filed one, according to which he admitted that Gur Sahai was the grandson of Dal Singh, and that Sheo Sahai was fifth in direct descent from Ram Ghulam. He alleged that Dal Singh was eleventh in descent from Partab Mal and that Ram Ghulam was tenth in descent from Shiam Das, and pleaded that he had been adopted by Gur Sahai, who made an oral will in his favour, and that in the absence of any near relative of Gur Sahai, he was entitled to succeed to the property as the son of Gur Sahai's sister. The pedigree filed by the defendant shows that of the relatives of the common ancestor of Gur Sahai and Sheo Sahai; Sheo Sahai, Gur Prasad, Sita Ram, Ram Sahai and Manohar Lal were sixteenth in descent from the common ancestor, Chajmal Das, and were alive at the death of Musammat Parbati. The Subordinate Judge found that Gur Sahai was seventh in descent from Partab Mal, through his son, Shiam Das, and that Sheo Sahai

1908

KALKA PRASAD v. MATHURA PRASAD.

was a descendant of Partab Mal in the same degree through another son, Ram Ghulam.

"In appeal this finding was challenged, the learned advocate for the defendants contending that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the lower Court based its finding was inadmissible, while the oral evidence was false.

"The Subordinate Judge based his finding that the pedigree relied on by the plaintiffs was proved on the oral evidence and the following documents :—

1 *and* 2 *Exhibits Nos.* 40 *and* 41.—Pedigrees filed by Shankar Sahai and Madho Ram in suits for pre-emption.

3. *Exhibit No.* 8.—The judgment in a pre-emption suit by Shankar Sahai against Fazl Husain, decided in 1889.

4 *and* 5. *Exhibits Nos.* 6 *and* 7.—Depositions of Gaya Prasad and Sheo Narain in the same suit.

6. *Exhibit No.* 9.—Pedigree filed by Sheo Sahai in 1892.

7. *Exhibit No.* 10.—A pedigree filed by Sheo Sahai in a suit instituted by the son of the second defendant against the first defendant in 1898.

8 *and* 9. *Exhibits Nos.* 14 *and* 15.—Copies of the settlement khewat and of a khewat attested by Rai Hazari Lal.

10. *Exhibit No.* 5.—A pedigree which purports to have been written by Maharaj Bahadur in 1872 and to have been given to the plaintiff Kalka Prasad by Sheo Narain in 1894, 1897, or 1898 for the purpose of a criminal charge.

"As Shankar Sahai and Madho Ram are admittedly alive the pedigrees filed by them were clearly inadmissible in evidence, and we have not been shown how the judgment in the suit of Shankar Sahai against Fazl Husain is admissible. In the deposition of Gaya Prasad he stated that Sundar Das was the ancestor of Sheo Narain, and thus contradicted the plaintiffs' pedigree, which shows that Sheo Narain was a descendant of Shiam Das the brother of Sundar Das. There is however nothing to show that Gaya Prasad was a member of the family or had any special means of knowledge, and his deposition should not have been admitted in evidence.

"Sheo Narain deposed that he was a descendant of Partab Mal, and his deposition was admissible as evidence of this. The rest of his statement referred to the persons who held shares in a sarai at Sandila which he said Sundar Das had founded. This part of the statement was relied on to prove that those who owned the shares are descendants of Sundar Das. That Sundar Das founded the Sarai which bears his name is probable, but the statement of Sheo Narain to that effect was hearsay and not admissible in evidence.

"The pedigree filed by Sheo Sahai in 1898 is also inadmissible in evidence, as Parbati Kunwar died two years previously, and the dispute regarding the succession to the property of Gur Sahai had then arisen.

"The copies of the Settlement Khewat and the Khewat attested by Rai Hazari Lal merely show in what shares some property was then held, and

are no evidence of the relationship of the persons who held them or of their relationship to Partab Mal or Chajmal Das. The pedigree which purports to have been written in 1872 by Maharaj Bahadur is said to have been given to Kalka Prasad by Sheo Narain for the purpose of a criminal case, but Maharaj Bahadur is still alive, and there is no evidence that Sheo Narain dictated it. Moreover, the evidence as to its being given to Kalka Prasad is unsatisfactory. He deposed that when he was 13 or 14 years of age his father dictated the pedigree of the family to him, and that he wrote it out and made 10 or 20 copies of it, so that he had learned it by heart 9 or 10 years ago. As he had either the original or copies of it then in his possession, there was no necessity for his obtaining a pedigree of the family for the purpose of the criminal case.

"So far, therefore, as the documentary evidence is concerned, there remains only the pedigree filed by Sheo Sahai prior to the death of Parbati Kunwar. He was a writer in the office of the Tahsildar, and probably foresaw that there would be a dispute about the succession to Gur Sahai's estate on Musammat Parbati's death, and it is not impossible that he was preparing for it, and in my opinion, no great value can be attached to the pedigrees which he filed. None of them was of an earlier date than 1889.

"When Sundar Lal, one of the plaintiffs, made a charge of waste against Musammat Parbati, she denied that he had anything to do with her property and said that he had made the application with the object of establishing a claim to it. This was in 1891, and the question of succession had therefore, arisen at that time, so that the pedigree filed by Sheo Sahai in 1892 would not be admissible in evidence. In one part of the judgment of the lower Court, the Subordinate Judge observed that the statement of Musammat Parbati was not proved, but Sundar Lal, in his evidence, admitted that she made it, although not in his presence. Further on in the judgment it is said that, even if it were proved, it would not affect the present case, because the son of the second defendant had recognized Sheo Sahai as the heir of Gur Sahai. It has been argued for the plaintiffs that the second defendant is bound by a statement or admission of his son in a former case, but it is needless to observe that no authority for such a contention was cited.

"The principal witness for the plaintiffs was Kalka Prasad, the eldest son of Sheo Sahai, to whose evidence I have already referred. He recited in Court a long and complicated pedigree, which he said had been dictated to him by his father. In it he gave not only his ancestors up to Mohan Das, the father of Chajmal Das, but also a large number of collaterals. As he was in Court at the hearing of the appeal, we tested his memory by asking him who was the father of Jaijai Ram, shown in the pedigree as the son of Durga Prasad, and the father of Raghubar and Manohar, and his first reply was Sidh Gopal. Afterwards he said that Jaijai Ram's father was Durga Prasad. He also said that Makhan Lal was the brother of Jaijai Ram, whereas in the pedigree he recited Makhan Lal appears as the son of Sabsukh Rai. I think this clearly shows that he had learned the pedigree by rote before he was examined as a witness and has forgotten it since. It is reasonable to suppose that a person may remember the names of his ancestors, which are recited at

1908

KALKA PRASAD v. MATHURA PRASAD.

domestic ceremonies, but it is suspicious when he professes to remember the names of collaterals also, in such an elaborate family pedigree. Personally, I think it is exceptional to find a person who is aware of, or can repeat from memory, the names of his ancestors in the sixth and seventh degrees, and of the descendants of those ancestors. The pedigree which Kalka Prasad deposed that he made from his father's dictation has not been produced, nor was any of the numerous copies of it which he said he had made. At first he deposed that none of these copies was in existence, but afterwards said that he could produce one of them if required to do so. The learned Subordinate Judge's only reason for believing this witness and other persons who were examined to prove the pedigree relied on by the plaintiffs appears to be that they are members of the family and are therefore likely to know the names of their ancestors. It might have occurred to him that such persons may have motives for giving false evidence, specially as two of them are plaintiffs in the suit. I do not believe in the evidence of Kalka Prasad.

"The evidence of Raghunath Prasad as to the finding of a pedigree, produced by him, among some waste papers, has been referred to. Like most of the evidence, his deposition has not been very intelligently recorded. He said that he remembers the names of the members of the family because he heard them at marriages and also learned them from his grandfather Daulat Ram, who was reading them to a Pandit from a paper, but he could not say what names were then mentioned, and no such paper has been produced. He said he remembered the pedigree which he 'recited and also read out' to the Court, but what document he read from in doing so is not stated. If he recited and read from the pedigree found with the waste papers there was no necessity for the Subordinate Judge to record it on a separate piece of paper, which apparently he did. Although the pedigree which he produced was first stated to have been found among waste papers he afterwards, according to the evidence, said that his father had it, and again that he found it after his father's death and only a few days before he filed his written statement in the case. It is most improbable that he did not know he was to be examined until a few days before he was called, and I do not think any weight can be attached to his evidence. As in the case of Kalka Prasad he probably committed to memory, a short time before his deposition was recorded, the pedigree which he recited.

"Ulfat Rai, the third of the plaintiff's witnesses, is not a member of the family, but is the brother of Gur Sahai's wife, and as he did not know the pedigree of Gur Sahai or Sheo Sahai, the object of examining him is not apparent.

"Gur Prasad is the son of Sheo Sahai's sister, and the pedigree, so far as he deposed to it, is admitted. Mohabbat Rai's mother was a member of the family, and he recited a pedigree which he said he had learned from her brother when he was 13 or 14 years old. He was 77 when he was examined, and as he admitted that he did not know the descendants of his own great-great-grand father without consulting a pedigree, and does not remember the years in which his own children were born, I do not believe his statement that he remembers the pedigree of his mother's family, which he could have

had no object in committing to memory, more than 30 years after he heard it.

"Dayal Shankar is the brother-in-law of Gur Prasad and says that he never saw a pedigree of the family, but learned the relationship of the parties which he deposed to from his father, who was not of the plaintiffs' family, but married a lady who did belong to it. As his father was not a member of the family, and is not proved to have had any special means of knowledge, evidence of statements made by him as to the relationship of Gur Sahai and Sheo Sahai, is inadmissible. The witness was contradicted by Hazari Lal, who deposed that he had shown a pedigree of the family to him. Gur Sahai was the father-in-law of Hazari Lal's brother, and Hazari Lal admitted that he did not know the relationship of the parties until he saw a pedigree after the suit was instituted.

"Sundar Lal, the last witness, and one of the plaintiffs, is a petition-writer, and therefore a person not likely to be believed by any one acquainted with the reputation which practically all men of his profession bear in this country. He first recited a pedigree of the family which did not correspond to that in the plaint, and when he discovered that he had made a mistake, recited a different one. Both were stated to have been in accordance with one dictated by his father, Sheo Sahai, and so far as he knew there was no written pedigree of the family until he wrote one, which was dictated by his father, to be filed in the pre-emption suit (in 1889). He afterwards appears to have said that he had seen no written pedigree until his brother brought one from Sheo Narain for the criminal case. If he did say this, he contradicted himself, and, as he must have known, if his brother had written a pedigree of the family and made numerous copies of it, he contradicts Kalka Prasad's evidence also. As he was a plaintiff, it is improbable that he did not know previously that he would be called as a witness. I do not believe his evidence.

"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the defendant, Mathura Prasad, the plaintiffs are heirs of Gur Sahai, as, according to it, they are *Samanodakas*, and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

After citing authorities on Hindu law on the subject the Court found that—

"According to the pedigree admitted by the defendant, Sheo Sahai was a *Samanodaka* of Gur Sahai, although he is 16th in descent from the common ancestor Chajmal Das, and Gur Sahai was 15th in descent from him.

But Gur Prasad, Sita Ram, Ram Sahai, and Manohar Lal were also alive on the death of Parbati Kunwar and were related to Gur Sahai in the same degree as Sheo Sahai. All these, therefore, were entitled to a $\frac{1}{5th}$ share in the property in suit."

1908

KALKA PRASAD v. MATHURA PRASAD.

On 16th March 1906 the Court of the Judicial Commissioner granted the plaintiffs leave to appeal to His Majesty in Council.

The defendants Mathura Prasad and Chaudhri Nasrat Ali on 16th December 1905 had applied to the Court of the Judicial Commissioner for review of its judgment, dated 18th September 1905, and on 17th April 1906 that Court (R. SCOTT and W. F. WELLS) cancelling the judgment and decree made on 18th September 1905, and holding that Sheo Sahai, the plaintiffs' father, being 16th in descent from the common ancestor Chajmal Das, according to the pedigree admitted by the defendant Mathura Prasad, was not a *Samanodaka* of Gur Sahai and was not entitled to succeed to his property.

In lieu, therefore, of the decree passed on 18th September 1905, the appeal was allowed, and the suit dismissed with costs.

On this appeal

De Gruyther, K. C., and *S. A. Kyffin* for the appellants contended that, on the death of Parbati Kunwar, Sheo Sahai the father of the appellants was the next reversionary heir to the estate of Gur Sahai, and in any case was a nearer heir than the defendant Mathura Prasad. As to the principles of Hindu law on which succession depended reference was made to Mayne's Hindu law, 7th edition, p. 679, para. 501. It was contended that the pedigrees on which the appellants relied were sufficiently proved for the reasons given by the Subordinate Judge. There was nothing unusual in a boy being able to repeat the names of his ancestors from having heard them recited on ceremonial occasions as the appellant Kalka Prasad had done; and the case of *Debi Pershad Chowdhry* v. *Radha Chowdhrain* (1), where such evidence was held to be admissible in support of a pedigree, was referred to. The Evidence Act (I of 1872), sections 11, 32, clause (5), and 50 were cited. The appellants' pedigrees were corroborated by their oral evidence, and on the other hand no proof was given of that put forward by the defendants. It was submitted that the appellants were not precluded by what took place before the Judicial Commissioners from now supporting the findings of the Subordinate Judge that they were the preferable heirs of Gur Sahai.

(1) (1904) I. L. R., 32 Calc., 84.

Ross for the 1st and 2nd respondents contended that after what had taken place at the hearing before the appellate Court in India, and the observations of the Judicial Commissioners on the appellants' evidence, they were estopped from raising on this appeal the contention that they were the exclusive heirs of Gur Sahai. It was submitted that the pedigrees were rightly held to be inadmissible in evidence as not coming within clause (5) of section 32 of the Evidence Act (I of 1872). It was most improbable that in 1872 Maharaj Bahadur was old enough to write out the pedigree of that date, and he had not been called as a witness in the case. Both on the evidence and as a matter of law the appellants had failed to prove their title to the property sued for and their suit had been rightly dismissed by the decision under appeal, which should be upheld.

De Gruyther, K. C., replied.

1908, *July 27th.*—The judgment of their Lordships was delivered by LORD ATKINSON :—

The suit out of which this appeal arises was instituted by the appellants, who are the three sons of one Sheo Sahai, deceased, claiming through their father as heirs of one Gur Sahai, deceased, to recover possession of the immovable property in the plaint described, of which Gur Sahai died possessed about 40 years ago.

Gur Sahai was succeeded in the possession and enjoyment of the property by his widow, Musammat Parbati, who died on the 22nd March 1896. Sheo Sahai died on the 22nd September 1899.

The principal defendant, the respondent Mathura Prasad, is the nephew of Gur Sahai, his sister's son. He took possession of the property on the death of Musammat Parbati, still retains it, and succeeded in obtaining mutation of names in his own favour.

Only two questions were discussed on the hearing of the appeal, and it is only necessary for its decision that their Lordships should deal with these. They are :—

1. Is it open to the plaintiffs, owing to what took place at the first hearing before the Court of the Judicial Commissioner, to attempt to establish that they are, according to Hindu Law, the heirs of Gur Sahai ?

1908

KALKA PRASAD v. MATHURA PRASAD.

2. If it be open to them to do so, is the evidence, legally and properly admissible, given before the Subordinate Judge, who tried the case in the first instance, sufficient to establish the fact of their alleged heirship ?

The course the proceedings took before the Court of the Judicial Commissioner is somewhat peculiar. The plaintiffs had, at the hearing, examined several witnesses and given in evidence several pedigrees, which, in the opinion of the Subordinate Judge, proved that Gur Sahai and Sheo Sahai were descended from one common ancestor, Partab Mal, son of Chajmal Das, were only seven degrees removed from that ancestor, and that the plaintiffs were, through Sheo Sahai, heirs of Gur Sahai. Mathura Prasad filed a pedigree which showed that Gur Sahai was not descended from Partab Mal at all, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das, that Gur Sahai stood in the 15th degree from the common ancestor, Chajmal Das, and Sheo Sahai in the 16th degree; and he contended that, under the Hindu law, heirships did not extend beyond the 14th degree, and that therefore he (Mathura Prasad), though only a sister's son, was to be preferred as heir to such remote relations.

No evidence whatever was given to prove the latter pedigree. Indeed it was abandoned by the respondents on this appeal. Yet the Court of the Judicial Commissioner, finding that it showed that five other persons stood in the same degree of relationship to Chajmal Das as did Sheo Sahai, held that the Hindu law permitted them, notwithstanding this, to succeed as heirs to Gur Sahai, and gave a decree for possession of one-fifth (not one-sixth as it should have been) of the land, the recovery of which was sought, as the share of Sheo Sahai therein.

Thereupon the defendants Nos. 1 and 2 applied under section 623 of the Civil Procedure Code for a review of this judgment, setting forth amongst other things:—

1. That the Court had held that the pedigrees set up by the plaintiffs were not proved, and that they were therefore not exclusively entitled to the property in suit.

2. That the question whether persons in the 16th degree could be preferred to Mathura Prasad, the nephew, was not allowed by the Court to be fully argued.

On this application the Court of the Judicial Commissioner decided that the Hindu law forbade what they had previously decided it permitted, namely, the succession of a person sixteenth in descent from a common ancestor, on the ground that he could scarcely be said to be a relation at all, and that therefore the nephew Mathura Prasad should be considered as nearer heir to Gur Sahai than Sheo Sahai. They accordingly dismissed the plaintiffs' suit with costs. It is to be observed, however, that the Court, in deciding on this application, made no reference to the first point which they had decided, *viz.*, that the pedigree set up by the plaintiffs was not proved.

In the first judgment of the Court they state that the finding of the Subordinate Judge that both Gur Sahai and Sheo Sahai were seventh in descent from Partab Mal had been challenged by the defendants' advocate, who contended that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the Lower Court based its finding was inadmissible. They then proceeded to devote four pages of their judgment to a minute and critical examination of the evidence, written and oral, adduced by the plaintiffs, giving their reasons for holding that the documents were inadmissible, and the witnesses unworthy of belief, and they wind up this examination with the passage on which the respondents rely as sufficient to shut out the plaintiffs from attempting to sustain the decision of the Subordinate Judge. It runs as follows:—

"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant, Mathura Prasad, the plaintiffs are heirs of Gur Sahai, as according to it they are *Samanodakas*; and therefore in the absence of other nearer heirs exclude the defendant, who is the son of Gur Sahai's sister."

It is inconceivable why the evidence given before the Subordinate Judge should be thus elaborately reviewed, if the plaintiffs' advocate had formally admitted he could not support that Judge's finding. It is almost as strange that this advocate should confine himself to a contention based on a pedigree proved by nobody, and binding on nobody but the person who filed it, and which, at the best, could only secure to his clients one-sixth of what they sought

1908

KALKA PRASAD v. MATHURA PRASAD.

to recover. It is not less peculiar that the contention which is stated to have been the only contention put forward by the plaintiffs, is the very contention which was conducted in such a fashion that a review was successfully applied for. Having regard to these several matters, it appears to their Lordships impossible to hold that the plaintiffs are by the statement contained in this paragraph estopped from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge on this point. The second question, therefore, alone remains for decision.

The plaintiffs gave in evidence at the trial three pedigrees, amongst others, namely (1) a pedigree purporting to have been written by one Maharaj Bahadur in 1872; (2) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lands other than and different from the lands sued for in this action, in which Sheo Sahai was plaintiff and Kesho and others defendants; (3) a pedigree filed in a suit brought for the recovery of the possession of certain lands in which Shankar Sahai (the son of the second defendant) was plaintiff, and Fazal Husain and others were defendants. The Subordinate Judge, though he held—quite rightly, in their Lordships' opinion—that the controversy out of which this appeal has arisen is but a stage in the dispute which arose on the death of Musammat Parbati in 1896, admitted each of these pedigrees in evidence, and the plaintiffs relied strongly upon them. They are not ancient family records handed down from generation and to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them. Taking them in the reverse order, the last is inadmissible, having been made *post litem motam*. The second is endorsed: "(Signed) Sheo Sahai, plaintiff, by the pen of Sundar Lal, Special Agent," and is on the evidence of Sundar Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent. It was held by the Court of the Judicial Commissioner not to be admissible on the same ground as the third pedigree because, in a statement made by Musammat

Parbati in the absence of Sundar Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in the village of Rampur Ansu, which he alleged was a halting-place, she had said :—"I have no kinship with him, nor am I on visiting and dining terms with him as a fellow-caste man. He has no concern with my proprietary interest *(hakkiat)* . . . The plaintiff's [Sundar Lal's] father, and his co-sharers have wasted their shares in the *hakkiat.*" But it is clear that the controversy to which this statement refers was not a controversy as to the heirship to Gur Sahai, but referred to an entirely different matter. In order to make the statement in admissible on this ground, the same thing must be in controversy before and after the statement is made—*Freeman* v. *Phillips*, (1); *Shrewsbury Peerage*, (2); *Duke of Devonshire* v. *Neill* (3). In their Lordships' opinion, having regard to the evidence of Sundar Lal and of the other witnesses examined for the plaintiffs, this pedigree was clearly admissible.

The first pedigree purports to be signed by Maharaj Bahadur, a son of Sheo Narain, a deceased member of the plaintiffs' family, who was however not examined as a witness. According to the evidence of Kalka Prasad, it was in the handwriting of the former and was obtained by him from Sheo Narain in the years 1894—1896 (the precise date is not fixed) as a statement of the family descent, for the purpose of being given in evidence in certain criminal proceedings instituted under section 323 of the Indian Penal Code in the case of *In re Baiju and others* v. *Sundar Lal and Durga Prasad*. It was thus adopted by Sheo Narain, is not shown to have been made *post litem motam*, and is therefore, in their Lordships' opinion, admissible.

These pedigrees disclose that Gur Sahai and Sheo Sahai are descended from a common ancestor, Partab Mal, one of the sons of Chajmal Das, the first through his son Har Prasad, the second through his son Ram Ghulam, each being six degrees removed from Partab Mal. Six of the many witnesses examined on behalf of the plaintiffs, members of the family, prove descent from this common ancestor. Three of these, namely,

(1) (1816) 4 M. & S., 486 (494, 497). (2) (1857) 7 H. L. C., 1 (22).
(3) (1877) 2 Ir. L. R., 132.

1908

KALKA PRASAD v. MATHURA PRASAD.

Kalka Prasad, Mohabbat Rai, and Sundar Lal, prove pedigrees, substantially identical with that signed by Sheo Sahai filed in 1892 or 1894, and others, such as Hazari Lal, prove important portions of it; while Lalta Prasad, one of the defendant's witnesses, deposed as follows:—

"Sheo Sahai also belongs to the family of Gur Sahai. I have heard that he is also remote by six degrees. In my opinion both [*i.e.*, Madho Ram and Sheo Sahai] are equally related, *i.e.*, in the same degree."

And Sri Kishen, another witness for the defendants, a priest of the family of Sita Ram deposed:—

"Sheo Sahai and Sheo Narain descend from Ram Ghulam. Gur Sahai descends from Har Prasad. Ram Ghulam, Har Prasad and Shiam Das are sons of Partab Mal."

This evidence precisely accords with the above-mentioned pedigrees numbered 1 and 2; proves, in fact, some of the most important steps in them, and is, therefore, the strongest corroboration of them.

Further corroboration of these pedigrees is to be found in the mode in which a certain Mohalla Sarai has been enjoyed. The family reputation is that this Sarai was founded by Sundar Das (one of the brothers of Partab Mal), who died childless. If the pedigrees of 1872 and 1894 be correct, then half, or an 8-anna share in this Sarai, should be found in the enjoyment of the descendants of Partab Mal, and the remaining 8-anna share in the enjoyment of the descendants of Shiam Das, the only brother of Partab Mal who had descendants. That, according to the evidence of Raghunath Prasad and Kalka Prasad, is precisely what is found. Two-anna shares were enjoyed by Sheo Sahai, Sheo Narain, and Gur Sahai respectively; a 2-anna share by Sheo Dayal and Ram Dayal (who died childless) jointly, and the remaining 8 annas by Sita Ram, Gur Prasad, Ram Narain, Shankar Sahai, and other descendants of Shiam Das. The Subordinate Judge points out that had Sheo Sahai and Sheo Narain been descended, as was contended for by the defendants, from Shiam Das and not from Partab Mal, the whole 8 anna share of Partab Mal must, in the events which have happened, have come to Musammat Parbati. Sita Ram, one of the defendants, gives in detail the distribution of an 8-anna share in the Sarai coming into the hands of his branch of the family, and states

that the Sarai is joint property. No evidence is given to contradict that of Raghunath Prasad and Kalka Prasad as to the persons amongst whom the share of Partab Mal in the Sarai is distributed.

It was argued by Mr. Ross, on behalf of the defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up the first pedigree, as deposed to by Kalka Prasad. No doubt there is much force in this argument, but, even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence, as was done by the Court of the Judicial Commissioner. They are, therefore, of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous and that its decrees should therefore be reversed with costs, and this appeal allowed. They will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants:—*Young, Jackson, Beard and King.*

Solicitors for the 1st and 2nd respondents:—*T. L. Wilson & Co.*

J. V. W.

GAYA PRASAD (PLAINTIFF) *v.* BHAGAT SINGH (DEFENDANT.) *

[On appeal from the Court of the Judicial Commissioner of Oudh.]

P. C. 1908 *June* 17, *July* 31.

Malicious prosecution—Information given to police—Prosecution by police after investigation—Acquittal of accused—Liability of informant where information is found to be false—"Prosecutor" in criminal case—Malice—Criminal Procedure Code, section 495.

It is not a principle of universal application that if the police or Magistrate act on information given by a private individual without a formal complaint or application for process the Crown and not the individual becomes the prosecutor.

Present:—Lord ROBERTSON, Lord ATKINSON, Lord COLLINS, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

1908

GAYA PRASAD v. BHAGAT SINGH.

Narasinga Row v. *Muthaya Pillai* (1) distinguished.

The answer to the question who is the "prosecutor" must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police; that is again a question of fact. Theoretically all prosecutions are conducted, in the name and in behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who, *pro hac vice*, represents the Crown. In India under section 495 of the Criminal Procedure Code (Act V of 1898) a private person may be allowed to conduct a prosecution, and "any person conducting it may do so personally or by pleader"; and where it is permitted this is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives.

The foundation of the action for malicious prosecution is malice, which may be shown at any time in the course of the inquiry.

Fitzjohn v. *Mackinder* (2) referred to.

Where the defendants, though their names did not appear on the face of the proceedings, except as witnesses, were directly responsible for a charge of rioting being made against the plaintiff, had produced false witnesses to support the charge at the investigation by the police; had taken the principal part in the conduct of the case before the police and in the Magistrate's Court; had instructed the counsel who appeared for the prosecution at the trial that the plaintiff "had joined the riot," and had done all they could to procure the conviction of the plaintiff, who was acquitted, being found not to have been present at the rioting.

Held that they were rightly found liable for damages in an action for malicious prosecution.

APPEAL from a decree (14th December 1905) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (31st July 1905) of the Subordinate Judge of Bahraich, who had decreed the appellant's suit.

The principal question for determination in this appeal was whether on the facts found, the respondents were liable in law to an action for damages for malicious prosecution.

The facts were as follows:—Between the two villages of Shukulpurwa in the Kapurthala estate and Keora in the Rampur Mathura estate the river Ghoora flowed. The respondent Sardar Bhagat Singh was the munsarim, and the respondent Imam-ud-din Shah was the kanungo of the Boundi division of the Kapurthala estate in which the village of Shukulpurwa was

(1) (1902) I. L. R., 26 Mad., 362.

(2) (1861) 9 C. B. N. S., 505 (522, 531).

situate. The appellant in 1902 was naib or manager of the Rampur Mathura estate.

On 28th October 1902 Imam-ud-din Shah reported to the Inspector of Police at Boundi that on that day 700 or 800 men of the Rampur Mathura estate had entered the village of Shukulpurwa, cut and carried away the crops on certain lands, and stolen other crops and property belonging to the tenants.

On 29th October the Inspector made an order for Bhagat Singh to inquire and report. On 30th October 1902 Bhagat Singh submitted a report upon which orders were passed that proceedings should be taken under section 145 of the Code of Criminal Procedure.

On 2nd November 1902 an application was made on behalf of the Kapurthala estate under section 107 of the Criminal Procedure Code to the Deputy Collector of Bahraich who sent the application for inquiry by the Inspector of Police at Fakhrpur. Certain persons who were named in the petition were charged, and the appellant's name was not mentioned. Before the police Bhagat Singh and Imam-ud-din conducted the prosecution. They then procured evidence that a riot was committed and that the appellant had personally taken part in the riot. By producing this evidence they induced the Inspector of Police to send the appellant and the other accused persons for trial before the Deputy Collector of Bahraich. The prosecution was conducted by a barrister instructed by Bhagat Singh and Imam-ud-din Shah, and pressed under their instructions against the appellant. These proceedings came to an end by an order made by the Magistrate on 15th July 1903, acquitting the appellant and all the other accused persons, and expressing the opinion that the charges had been concocted by the respondents.

On the 14th July 1904 the appellant brought the suit out of which this appeal arose against Bhagat Singh and Imam-ud-din Shah claiming damages Rs. 7,000 from them for malicious prosecution.

The defence was that the defendants did not institute any criminal prosecution, but were merely witnesses for the prosecution; that as witnesses they were justified in making the

1908

GAYA PRASAD v. BHAGAT SINGH.

statements they did in the Criminal Court, and no suit could legally be brought against them ; and that the prosecution was not malicious nor without reasonable and probable cause, nor did it arise from any illegitimate motive.

The most material issue was the first "was any report made to the police, or any complaint lodged by the defendants against the plaintiff, and did the defendants or either of them prosecute him on the charge of riot?" Others raised the question of whether there was malice, or want of reasonable and probable cause.

On the evidence the Subordinate Judge held that there was no doubt as to the two defendants being the chief cause of the plaintiff's having been accused of rioting ; and although their names did not appear on the face of the criminal proceedings, yet they were in fact the prosecutors, and had concocted and fabricated false evidence to get the plaintiff charged with rioting; that there was no reasonable and probable cause for the prosecution and that the defendants had acted maliciously. A decree was accordingly made in favour of the plaintiff, for Rs. 6,082-8 and costs of the suit.

On appeal by the defendants to the Judicial Commissioner of Oudh that Court (W. F. WELLS, 2nd Additional Judicial Commissioner) held, on the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (1), and *Dudhnath Kandu* v. *Mathura Prasad* (2) that no one but a person who has made a formal complaint or application for process to a Court could be sued for damages for malicious prosecution, and in the result he dismissed the suit, but without costs. The material portion of his judgment was as follows :—

"It has been urged in this Court that the prosecution was a police prosecution, and that though the defendants may have been in Court assisting counsel, and though some of his fees may have been paid through them, yet the fees were paid actually by the estate and the defendants were merely acting under the instructions of the superior officers in the estate, which therefore, must be considered to be the real prosecutor.

"Now it is admitted that no formal complaint was made to a Court against the plaintiff, and it is alleged that he was sent for trial under section 147, Indian Penal Code, on information given to the police by the defendants, who produced evidence before the police and took an active part in the case by instructing Counsel in the Courts.

(1) (1902) I. L. R., 26 Mad, 362. (2) (1902) I. L. R. 24, All. 3

"The first question to the considered is, whether, if this allegation be true, the defendants are liable in this action.

"The learned counsel for the defendants has relied greatly on the case of *Narasinga Row* v. *Muthaya Pillai* (1), in which it was held that the only person who can be sued in an action for malicious prosecution is the person who prosecutes. The defendant in that case gave information to the police of an offence cognizable by them, and the police after investigation thought fit to prosecute and the plaintiff was acquitted. It was held that, though the defendant may have instituted the criminal proceedings before the police, he certainly did not prosecute the plaintiff and was not responsible for the act of the police. The learned Judges appear to have followed another unreported decision of the same Court. It does not appear from the decision reported if the defendant in that case brought witnesses before the police or if he afterwards took an active part in the conduct of the case.

"The learned counsel for the defendants has relied also on the case of *Rai Jang Bahadur* v. *Rai Gudor Sahai* (2). In that case the plaintiffs were said to have been prosecuted in the Criminal Courts in consequence of information given to the police. It does not appear definitely if the police sent the accused up for trial, but it is clear that in addition to the information given to the police a complaint was filed in the Criminal Courts by two of the defendants' servants, which did not occur in the present case; and this would have probably prevented the learned Judges adopting the view of the Madras High Court, even if the plaintiff was sent up to trial by the police. They held that the defendant having admittedly paid the costs of the prosecution, must be held liable; and the learned counsel for the defendants has therefore argued that the Maharaja of Kapurthala, and not his clients should be held liable. I should not however be disposed to accept this view in the present case, having regard to its peculiar circumstances, which differ entirely from those of *Rai Jang Bahadur* v. *Rai Gudor Sahai*.

"I was also referred to the case of *Dudhnath Kandu* v. *Mathura Prasad* (3). In that case the plaintiff was prosecuted by a Magistrate on information given by the defendant, who had, however, not mentioned him in the formal complaint. Here too, it does not appear what part the defendant took in the subsequent proceedings.

"In the case of *Musa Yakub Mody* v. *Manilal Ajitrai* (4), the defendant had started the prosecution by a complaint laid in court; proceedings were taken by Government for extradition, and the plea was set up that the defendant was not liable in respect of those proceedings because of the action of Government. This plea was overruled, as the defendant had actually conducted the case for extradition; and moreover he had clearly started the prosecution by a formal complaint. In that judgment there is a reference to the case of *Fitzjohn* v. *Mackinder* (5), in which it was held that a person was responsible for starting or continuing a prosecution even when he had been ordered by a Court to prosecute. But in that case the Court order was

(1) (1902) I. L. R., 26 Mad., 362.
(2) (1897) 1 C. W. N., 537.
(3) (1902) I. L. R., 24 All. 317.
(4) (1904) I. L. R., 29 Bom., 368.
(5) (1861) 9 C. B. N. S., 505 : 30 L. J. C. P. 156.

1908

GAYA PRASAD v. BHAGAT SINGH.

the result of perjury on the part of the defendant himself. No authority has been quoted to me which really conflicts with the view taken by the Madras High Court, and the Allahabad decision to some extent supports their view.

"The principle followed appears to be this. If the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual. It may be said that if any person is aggrieved thereby, his remedy would lie in a prosecution under section 182 of the Penal Code, or for perjury, both of which would require sanction under section 195 of the Criminal Procedure Code, and so there can be no action against the individual for malicious prosecution. But a false charge made in a complaint would be punishable under section 211, Penal Code, and prosecution in respect of it would also require sanction under section 195, Criminal Procedure Code, yet it would undoubtedly afford a ground for an action for malicious prosecution. It is difficult to see why a person who has had to defend himself against a serious false charge which has been set on foot by another, should have a civil remedy when the charge is made in one way and not when the charge is made in another way. In a country where the police have a doubtful reputation, deserved or not, it seems unreasonable that a man should be able to secure himself against a civil action simply because his charge is supported by the *imprimatur* of a police officer, to whom he may have given a gratification. But although I entertain these doubts, I hesitate to differ from the views of several of the learned Judges of the Madras and Allahabad High Courts, who appear to hold that in order to afford ground for an action for malicious prosecution there must be some formal complaint or application for process to a Court.

"It is contended that the defendants adduced evidence before the police. But if the fact that the police took up the case affords any privilege to the defendants in respect of the information they gave, it would also, I think, protect them in the matter of the production of evidence. In the Madras case I can hardly doubt that the complainant gave assistance to the police in the matter of procuring evidence.

"It is further urged that the defendants having assisted counsel for the prosecution in Court makes them liable as prosecutors. But I am unable to accept this view. The case was one of considerable importance to the Kapurthala estate and the subordinate officials who were acquainted with the circumstances, would naturally be directed to look after the case, and see that what was necessary was elicited from the witnesses. If no liability attaches to the defendants from the information said to have been given to the police, I do not think any would, under the circumstances, attach from what they did subsequently in Court.

"Holding the view set forth above, I do not think it necessary to enter into details of the facts and determine whether or not the police acted on information given by the defendants and whether the charge of rioting was false or not.

"But I may say that having studied the documentary evidence to which my attention was drawn and read most of the voluminous oral evidence

recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under section 147, at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the Magistrate who tried the case; and that the evidence on the record produced by the defendants is not such as to incline me to believe it to have been proved. The evidence of Bhagat Singh was anything but straightforward.

"Under these circumstances, though I must allow the appeal on the legal grounds set forth above, I consider that the parties should pay their own costs."

From that decision special leave to appeal was granted to the appellant by two Judges of the Judicial Commissioner's Court (L. G. EVANS and E. CHAMIER) under section 595, clause (*c*) of the Civil Procedure Code, on the ground of the importance of the question of law raised, and on the ground that the question of law had been wrongly decided, and that the decision was opposed to the ruling of the Bombay High Court in *Musa Yakub Mody* v. *Manilal Ajitrai* (1).

On this appeal, which was heard *ex parte*, *De Gruyther, K. C.*, and *S. A. Kyffin* for the appellant contended that the finding of law by the appellate Court that no action would lie for damages for malicious prosecution against any person who has not made a formal complaint for process to a Court was erroneous. The Court came to that finding on the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (2); and *Dudhnath Kandu* v. *Mathura Prasad* (3), which he considered he was bound to follow, though his real opinion of the facts of the case (see the conclusion of his judgment) was substantially the same as that of the Subordinate Judge, who said that there was no doubt as to the two defendants being the chief cause of the appellant's having been accused of rioting, and that, although their names did not appear on the face of the proceedings, yet they were in fact the prosecutors and had concocted and fabricated false evidence to get the appellant charged with that offence. It was submitted that the liability of the defendants in each case should be determined on the facts. Where, as here, the defendants not only [illegible] false information to the police on which the charge under section 147 of the Penal Code was made against the appellant, but took an active part in the conduct of

(1) (1904) I. L. R., 29 Bom., 368. (2) (1902) I. L. R., 26 Mad., 362.
(3) (1861) 9 C. B. N. S., 505, 22.

1908

GAYA PRASAD v. BHAGAT SINGH.

the proceedings in the courts and instructed counsel to press the charge against him, all the time knowing that the appellant was innocent, they should not be allowed to evade responsibility merely because they did not initiate the complaint in court. Reference was made to *Fitzjohn* v. *Mackinder* (1); Criminal Procedure Code (Act V of 1898), section 4 as to the definition of "cognizable offence," section 145 as to disputes likely to cause a breach of the peace, section 156 as to the investigation by police officers of a "cognizable offence," schedule II "offence under section 147 of the Penal Code (Act XLV of 1860)," section 190 as to "conditions requisite for initiation of proceedings," and section 495 as to "permission to conduct prosecution." The decision of the Subordinate Judge was correct and should be restored. The two Judges of the Judicial Commissioner's Court who granted special leave to appeal appear to have doubted the correctness of the judgment now under appeal.

1908, *July* 31*st*:—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the plaintiff being manager of the Rampur Mathura estate, and the defendants being respectively munsarim and kanungo of the Boundi division of the Kapurthala estate. The case arose out of a dispute regarding the ownership of some alluvial land lying between the two estates; and the charge was that the plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on the 22nd November 1902, but was not disposed of until the 15th July 1903, when the Magistrate dismissed it, holding that "there was no riot at all," and adding:

> "I consider Kapurthala estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints."

The plaintiff thereupon brought this action, claiming Rs. 7,000 damages. The Subordinate Judge held that "it was found during the trial of the criminal proceedings, and proved before me by the evidence in the case, that the two defendants have concocted and produced false evidence to get the plaintiff charged with the crime," and he gave the plaintiff a decree for

(1) (1861) 9 C. B., N. S., 505.

Rs. 6,082-8 damages and the costs of the suit. The Judicial Commissioner on appeal, on the authority of the case of *Narasinga Row* v. *Muthaya Pillai* (1) dismissed the suit, holding that "if the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual;" but he added:

"I may say that, having studied the documentary evidence to which my attention was drawn, and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under section 147 at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the Magistrate who tried the case; and that the evidence on the record produced by the appellants is not such as to incline me to believe it to have been proved."

It will be convenient to refer at once to the decision of the Madras High Court (*ubi supra*) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms:—

"The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned

(1) (1902) I. L. R., 26 Mad., 382.

1908

GAYA PRASAD v. BHAGAT SINGH.

witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the magistrate —it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—Who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India a private person may be allowed to conduct a prosecution under section 495 of the Criminal Procedure Code, which provides that "any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police . . . . Any person conducting the prosecution may do so personally or by a pleader." When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry. As Bramwell, B. observes in *Fitzjohn* v. *Mackinder* (1):—

> "This action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. . . . Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

And in the same case, Cockburn, C.J., says (at p. 531):

> "A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bonâ fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the

(1) (1861) 9 C. B., N. S., 505; at p. 522.

prosecution, with the intention of procuring *per nefas* a conviction of the accused."

Turning to the facts of the present case, it appears that on the 2nd November 1902 an application was made to the Deputy Collector of Bahraich for an investigation by the police of a charge of unlawful assembly against eight persons, of whom the plaintiff was not one. The investigation was entrusted to Izhar-ul-haq, a Sub-Inspector of Police, who says:

"I summoned the plaintiff because Bhagat Singh gave me a list of accused persons containing plaintiff's name. . . . When Bhagat Singh produced that list, I said to him that the complaint filed in Court did not contain Gaya Prasad's name. How was it that the defendant had mentioned his name . . ? And then Bhagat Singh [said] that the chief cause of riot was the plaintiff; so he gave the plaintiff's name in the list, and that he would be summoned."

This makes it clear that Bhagat Singh was directly responsible for any charge at all being made against the plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the police and in the Magistrate's Court, and the learned counsel who appeared for the prosecution at the trial before the Magistrate expressly says that they instructed him that Gaya Prasad "joined the riot." As already mentioned, the Magistrate found that there was no riot at all, and that on the day on which it was alleged to have occurred, the appellant was ill at Lucknow. The charge was a false one to the knowledge of the respondents, and they must abide the consequences of their misconduct.

In granting leave to appeal to his Majesty in Council, the learned Judicial Commissioners say:

"It is difficult to overestimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution who makes a false report which results in a prosecution, or who instigates the police to send persons up for trial under section 170 of the Code of Criminal Procedure, or who conducts the case against those persons when sent up for trial."

And they add:

1908

GAYA PRASAD v. BHAGAT SINGH.

"All these are circumstances which occur perhaps daily in every district in India, and having regard to the immense number of false charges made, (we) think it most desirable that there should be no doubt as to the law on the subject."

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the appeal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant:—*Sanderson, Adkin, Lee and Eddis.*

J. V. W.

1908
June 5.

APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

JUMAI KANJAR (DECREE-HOLDER) *v.* ABDUL KARIM KHAN (JUDGMENT-DEBTOR).*

Execution of decree—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 179 (5)*—Civil Procedure Code, section* 248*—Date of issuing notice.*

Held that the expression "the date of issuing notice under the Code of Civil Procedure, section 248," as used in article 179 (5) of the second schedule to the Indian Limitation Act, 1877, means the date upon which the Court passes an order for issue of a notice under section 248, not the date upon which such order actually issues.

THIS was an appeal arising out of proceedings for the execution of a decree. The decree-holders applied for execution, within time, on the 15th of January 1904. On the 21st of January 1904, the Court passed an order that notice should issue to the judgment-debtor under section 248 of the Code of Civil Procedure. The notice actually was issued on the 25th of January 1904. The next application for execution was presented on the 24th of January 1907, and it was then objected to as being barred

*Second Appeal No. 1180 of 1907 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 9th of July 1907, confirming a decree of Behari Lal Mehra, Munsif of Mirzapur, dated the 4th of May 1907.